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NO. 83-799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS J. LEWIS,
Petitioner,

v.

BROWN & ROOT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The district court and the court of appeals properly decided this case. However, for purposes of opposing further review of the issues raised in the Petition for Writ of Certiorari, Respondent submits the following restatement of the questions presented by Petitioner:

1. Whether the findings of the district court that Petitioner's action was frivolous, unreasonable and without foundation and that Petitioner's counsel unreasonably and vexatiously multiplied these proceedings are clearly erroneous.

2. Whether the district court may award attorney's fees against Petitioner and his counsel after ten days from the entry of judgment and after the filing of a notice of appeal.

3. Whether Petitioner's counsel waived his right to conduct redirect examination of Petitioner by failing to return from a fifteen minute recess that Petitioner's counsel requested.

4. Whether the district court's finding of no discrimination was clearly erroneous.

5. Whether the district court abused its discretion in dismissing Petitioner's case for want of prosecution.

6. Whether Petitioner has standing to contend bias by the district judge.

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OPINIONS IN THE COURTS BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 711 F.2d 1287 (5th Cir. 1983). The opinion of the district court dismissing Petitioner's case on the merits and for want of prosecution is reported at 32 Fair Empl. Prac. Cas. (BNA) 1089 (S.D. Tex. 1982), and 30 Empl. Prac. Dec. (CCH) ¶ 33,040 (S.D. Tex. 1982). The opinion of the district court awarding

attorney's fees to Respondent is reported at 32 Fair Empl. Prac. Cas. (BNA) 1090 (S.D. Tex. 1982), and 30 Empl. Prac. Dec. (CCH) ¶ 33,041 (S.D. Tex. 1982).[1]

STATEMENT OF JURISDICTION

Respondent adopts Petitioner's statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are of relevance:

42 U.S.C. § 2000e-5(k)

> In any action or proceeding under this subchapter [Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

28 U.S.C. § 1927

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 144

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

1. These opinions appear as Appendix B and Appendix E, respectively, of the petition.

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT OF THE CASE

This is a race discrimination case filed by Petitioner, Dennis J. Lewis, against Respondent, Brown & Root, Inc.,[2] in which Lewis alleges that Brown & Root terminated his employment and denied him reemployment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981.

The district court, after a trial on the merits, found that Brown & Root had not discriminated against Lewis and dismissed his case. Alternatively, because Lewis and his counsel failed to return from a fifteen minute recess requested by Lewis' counsel during the trial of the case, the district court dismissed Lewis' action for want of prosecution. In addition, the district court found that Lewis' claims were so frivolous and were litigated in such an irresponsible, unreasonable and vexatious manner that

2. Brown & Root, Inc., a wholly owned subsidiary of Halliburton Company, is a Texas corporation engaged in the construction business.

Lewis and his counsel should be held jointly and severally liable for Brown & Root's attorney's fees. The court of appeals affirmed in all respects.

As the Fifth Circuit noted at the outset of its opinion, "The record in this case paints a convincing picture of the sort of civil rights action that should never have been filed." 711 F.2d at 1288. The Fifth Circuit's opinion (attached to the petition as Appendix A) contains all of the facts material to this Court's consideration of the questions presented by the petition. Consequently, these facts need not be restated here.

However, Respondent takes issue with several assertions made by Petitioner in the petition. First, Petitioner states that "at no time has he made a charge or claim that his discharge was discriminatory." (Petition at 4) Petitioner's complaint, upon which this lawsuit was tried, contains just such an allegation. (The Fifth Circuit shares Respondent's observation in this regard. 711 F.2d at 1288). Only in Petitioner's brief to the Fifth Circuit on appeal did he concede that his discharge was not discriminatory.

Second, Petitioner states that the district court took its noon recess at 12:45 p.m. until 1:30 p.m., and makes reference to the original transcript of the trial, attached to the petition as part of Appendix F. (Petition at 6) Although Petitioner later points out that the portion of the transcript to which he refers was corrected (Petition at 7), he fails to point out the manner in which the transcript was corrected and, even more egregiously, fails to append the district court's order reflecting the changes that were made. This order of the district court, and the affidavit of the court reporter incorporated therein, make

it abundantly clear that Petitioner and his counsel failed to return from the fifteen minute recess which the district court granted at the request of Petitioner's counsel. (The referenced order and affidavit are appended hereto.)

Finally, Petitioner states that prior to leaving the courtroom after the requested fifteen minute recess had been granted, "court personnel of the district court were asked to inform the district judge the plaintiff and his counsel may be a few minutes late getting back. . . ." (Petition at 6) Petitioner also asserts that he and his counsel were present in the courtroom prior to 1:00 p.m. (Petition at 6) There is no evidence in the record to support these statements. As the Fifth Circuit noted, such contentions were raised on brief and at argument but, "[s]o far as the record shows, neither Lewis nor his counsel ever appeared again after the recess." 711 F.2d at 1289.

SUMMARY OF ARGUMENT

As a review of the Fifth Circuit's opinion and the facts recited therein readily demonstrates, this case is not one which warrants the exercise of the Supreme Court's discretionary jurisdiction on writ of certiorari. None of the general considerations set forth in Supreme Court Rule 17 is met. More specifically, the Fifth Circuit's decision does not create a conflict in the circuits, or with any state court of last resort, as to any question of law. In fact, no significant question of law is presented in the petition.

In essence, the petition seeks nothing more than a further review of the district court's findings of fact and of the district court's exercise of its discretion in dismissing Petitioner's case for want of prosecution. The district court found that (1) Petitioner was not the victim of

discrimination, (2) Petitioner's case was frivolous, unreasonable and without foundation, and (3) Petitioner's counsel unreasonably and vexatiously multiplied this litigation. These findings of fact, as well as the district court's dismissal of Petitioner's case for want of prosecution, received the concurrence of the Fifth Circuit. The Supreme Court's discretionary jurisdiction on writ of certiorari should not be exercised merely to add a third layer of review of facts which already have been found in the same fashion by a federal district court and court of appeals.

REASONS WHY THE WRIT SHOULD BE DENIED

1. None of the Considerations Which Warrant the Supreme Court's Exercise of Discretionary Jurisdiction on Writ of Certiorari Is Met.

Rule 17 of the Rules of the Supreme Court of the United States sets forth general considerations indicating the character of reasons that the Court will consider in determining whether review on writ of certiorari will be granted. In the instant case, the petition for writ of certiorari raises none of these considerations, nor could it possibly do so because none of the considerations is met. The decision of the Fifth Circuit does not conflict with a decision of another federal court of appeals on the same matter, nor does it conflict with a state court of last resort on a federal question. In fact, the Fifth Circuit decided no federal question at all. As will be set forth more fully below, the Fifth Circuit merely affirmed the fact-findings of the district court and the district court's application of clear and unequivocal statutory language to the facts found.

Finally, Petitioner does not assert that the decisions of the district court or the court of appeals have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for the Supreme Court's power of supervision." Sup. Ct. R. 17.1(a). Petitioner does note, however, that this case "may have serious consequences with respect to enforcement of civil rights legislation." (Petition at 7) The fact of the matter is that this case will be of consequence only to litigants and counsel who commence, persist in, *and conduct in an irresponsible manner*, unwarranted proceedings like this one. 711 F.2d at 1292. Respondent submits that such people are few in number.

2. The Petition Merely Challenges the District Court's Findings of Fact Which Received the Concurrence of the Court of Appeals.

As indicated above, no question of federal judicial power or statutory interpretation is involved in this case. Although the petition purports to raise questions of the "power" of the district court to dismiss Petitioner's cause of action and to award attorney's fees, there really is no dispute as to the judicial authority of the district court. Section 2000e-5(k) of Title VII, as interpreted by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), unequivocally gives the district court power to award attorney's fees to a prevailing defendant. Similarly, 28 U.S.C. § 1927 clearly grants the district court authority to make Petitioner's counsel jointly and severally liable for an award of attorney's fees under the appropriate circumstances. In essence, Petitioner is challenging only the facts found by the district court which enabled it to exercise its undeniable judicial authority under Section 2000e-5(k) and Section 1927.

With respect to the merits of Petitioner's claims of race discrimination, the district court made a fact-finding that no discrimination took place. With regard to the award of attorney's fees to Respondent, the district court found that Petitioner's case was frivolous, unreasonable and without foundation, and that Petitioner's counsel unreasonably and vexatiously multiplied the proceedings. The fact-findings of the district court on the merits of Petitioner's claims as well as the district court's fact-findings regarding Respondent's entitlement to attorney's fees all received the concurrence of the court of appeals.

Under well-accepted principles of Supreme Court practice and procedure, a petition challenging findings of fact does not raise issues worthy of the Supreme Court's attention. As stated by Mr. Justice Holmes, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is particularly true where, as here, the district court's findings received the concurrence of the court of appeals. In the words of Mr. Justice Jackson, "A court of law, such as this Court is, rather than a court for correction of errors and fact findings, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Manufacturing Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In sum, the district court undeniably had the power to dismiss Petitioner's cause of action upon a finding of no discrimination and to award attorney's fees upon findings of frivolousness, unreasonableness and vexatiousness. The district court made these findings and the court of appeals concurred. In fact, a cursory review of the Fifth

Circuit's opinion indicates that that court took an even dimmer view of these proceedings and the manner in which they were prosecuted than did the district court. In this regard, the opening line of the Fifth Circuit's opinion bears repeating: "The record in this case paints a convincing picture of the sort of civil rights action that should never have been filed." 711 F.2d at 1288.[3] If the case should not have been filed, it stands to reason that it does not merit the Supreme Court's attention.

3. The Decisions of the District Court and the Court of Appeals are Correct.

With respect to the questions presented by the petition, the district court and the court of appeals properly resolved each of these issues. First, Petitioner questions the district court's findings that Petitioner's action was frivolous, unreasonable and without foundation and that Petitioner's counsel unreasonably and vexatiously multiplied these proceedings. As the district court and the court of appeals noted, the evidence offered by Petitioner did not demonstrate, even by inference, any unlawful discrimination. Petitioner "candidly and specifically attributed his discharge to the racially evenhanded enforcement of a valid rule against horseplay and the delay in his rehiring to the personal dislike borne him by a supervisor, stemming from an earlier incident between them which had nothing to do with race." 711 F.2d at 1291. In light of this evidence, and the repeated rehiring of Petitioner by Respondent after this litigation commenced,

3. Even Judge Tate, who dissented from the majority's holding on the attorney's fee award, felt that this case was "at best a marginal civil rights discrimination claim ineptly handled." 711 F.2d at 1292.

a finding that Petitioner's cause of action was frivolous is not clearly erroneous.

Similarly, given the frivolous nature of the case and the "irresponsible *manner* in which the litigation was conducted," *id.* at 1292, the district court's finding that Petitioner's counsel unreasonably and vexatiously multiplied what were from their commencement needless proceedings is not clearly erroneous.

The second issue raised by Petitioner is whether the district court had the power to award attorney's fees more than ten days after the entry of judgment and after the filing of a notice of appeal. Petitioner did not raise the ten-day limitation issue arising under Rule 59(e) of the Federal Rules of Civil Procedure before the court of appeals and thus cannot properly raise it here. *Lawn v. United States,* 355 U.S. 339 (1958).[4] With respect to Petitioner's contention that a district court cannot award fees after a notice of appeal has been filed, it is significant that although Petitioner raised this issue in the court of appeals, the court of appeals did not feel the contention worthy of its consideration. In any event, Petitioner's argument in this respect is without merit. *Knighton v. Watkins,* 616 F.2d 795 (5th Cir. 1980).

The third issue raised by the petition for writ of certiorari is whether Petitioner was "allowed his day in court." The fact of the matter is that Petitioner had his day in court. Petitioner, whose case had been dismissed previously for want of prosecution, proceeded, along with his attorney, to disappear after he was cross-examined.

4. Even if the issue were properly before this Court, it has been held that a motion for attorney's fees in a civil rights case is not governed by the ten-day limitation on motions to alter or amend judgments. *Knighton v. Watkins,* 616 F.2d 795 (5th Cir. 1980).

Prior to the disappearance of Petitioner and his counsel, Petitioner's counsel already had advised the district court that he had no further witnesses left to call. These facts justify the Fifth Circuit's conclusions that Petitioner's counsel waived his opportunity to conduct redirect examination and that Petitioner's case on the merits was closed.

In his fourth question for review, Petitioner contends that his case should not have been dismissed because he proved a prima facie case. However, as this Court recently held in *United States Postal Service Board of Governors v. Aikens*, ____U.S.____, 103 S.Ct. 1478 (1983), the ultimate issue is one of discrimination *vel non*. In other words, regardless of any legal issues concerning the allocation of the burden of proof in employment discrimination cases, the ultimate question to be answered is whether the plaintiff was the victim of discrimination. In the instant case, the district court answered this question in the negative, and the court of appeals held that the record amply supported this finding. As discussed previously, Petitioner admitted that his discharge and the delay in his rehiring were not racially motivated. These admissions, plus the fact that Lewis was rehired by Brown & Root on several occasions following the institution of his lawsuit, amply support the district court's finding of no discrimination.

Petitioner's fifth question for review concerns the district court's dismissal of his case for want of prosecution. The facts relevant to this issue, though set forth in the Fifth Circuit's opinion, bear repeating. Early in the litigation, Lewis evidenced his disregard for the prosecution of this case by failing to appear for a properly noticed

deposition. Later, the failure of Lewis and his counsel to appear for docket call resulted in dismissal. Despite this record of inattentiveness to the litigation on the part of Lewis and his counsel, the district court reinstated the action. However, Lewis and his attorney did not learn their lesson and their failure to prosecute this case with any degree of diligence continued at the trial itself. Lewis appeared forty-five minutes late for his own trial, then, along with his counsel, inexplicably disappeared in the middle of the trial.

In the petition, Petitioner comments upon the severity of the dismissal sanction. (Petition at 15) Dismissal for want of prosecution undoubtedly is a harsh sanction, but as this Court has stated with reference to the natural tendency on the part of reviewing courts to be influenced by the severity of dismissal:

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The district court, in the sound exercise of its discretion, found this case to be one where the harsh sanction of dismissal was appropriate. The court of appeals affirmed, finding that dismissal for want of prosecution was not an abuse of the district court's discretion. In so holding, the Fifth Circuit merely applied the well-established

principle that "dismissal for want of prosecution is appropriate where there is a record of delay or contumacious conduct and an indication that the client knew of or participated in the attorney's failure to prosecute." 711 F.2d at 1291, citing *Anthony v. Marion County General Hospital,* 617 F.2d 1164 (5th Cir. 1980) and *Lopez v. Aransas County Independent School District,* 570 F.2d 541 (5th Cir. 1978).

Finally, Petitioner questions whether the district judge should have disqualified himself from the trial of this case. The Fifth Circuit made no mention of this point in its opinion, undoubtedly because the answer was abundantly clear. Petitioner alleged bias on the part of the district judge for the first time before the court of appeals. Consequently, he did not have standing to raise the issue as he had failed to comply with the requirements of 28 U.S.C. § 144. This statute requires a party to a proceeding in the district court to file a timely and sufficient affidavit stating that the judge before whom the matter is pending has a personal bias against him or in favor of the adverse party. The affidavit must state the facts and the reasons for the belief that bias exists "and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard. . . ." 28 U.S.C. § 144. As Lewis failed to file a timely affidavit, he was without standing in the court of appeals to contend bias by the district court. *Yates v. Manale,* 377 F.2d 888 (5th Cir. 1967), *cert. denied,* 390 U.S. 943 (1968).

REQUEST FOR DAMAGES AND DOUBLE COSTS

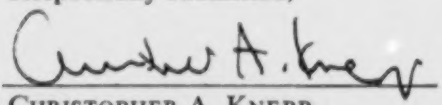
Rule 49.2 of the Rules of the Supreme Court permits the Court to award a respondent appropriate damages when a petition for writ of certiorari is frivolous. In light of the fact that the district court and court of appeals already have held this case to be frivolous, Respondent respectfully requests an award of damages equivalent to the attorney's fees incurred by Respondent in responding to this petition. Respondent also respectfully requests that an award of double costs be made pursuant to Rule 50.7.

In addition, Respondent respectfully requests that Petitioner's counsel be made jointly and severally liable for any award of fees or costs. In light of the Fifth Circuit's statement "that the entire course of proceedings was unwarranted and should never have been commenced nor persisted in," 711 F.2d at 1292, it stands to reason that the petition filed with this Court simply further multiplied what already were unreasonable, vexatious and needless proceedings. Consequently, Petitioner's counsel should be liable for the excess costs and attorney's fees occasioned by the petition. 28 U.S.C. § 1927.

CONCLUSION

The petition for writ of certiorari does not raise issues which warrant the exercise of this Court's discretionary power of review. For the most part, the petition merely challenges findings of fact made by the district court which received the concurrence of the court of appeals. Both the district court and court of appeals made it abundantly clear that the judicial system should not have had to waste its time on Petitioner's frivolous case. This case has gone far enough. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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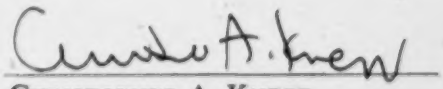
CERTIFICATE OF SERVICE

On this third day of January, 1984, three true and correct copies of the above and foregoing instrument were forwarded via United States certified mail, return receipt requested, to:

Mr. Horace R. George
4720 Dowling Street
Houston, Texas 77004



CHRISTOPHER A. KNEPP

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1762

[Filed January 7, 1983]

DENNIS J. LEWIS,
Plaintiff,

v.

BROWN & ROOT, INC.,
Defendant.

ORDER

Presently pending before the Court is Defendant's motion to correct the record pursuant to Rule 10(e), Fed. R. App. P. Upon reviewing the affidavits of Plaintiff and the Court Reporter, the arguments of Defendant's counsel and the Findings of Fact entered by the Court, it is apparent that there is no disagreement concerning the events which transpired on April 21, 1982.

It is, therefore,

ORDERED that the record of this case be corrected to reflect the facts stated in the affidavit of Mr. Gettig filed in this cause on January 7th, 1983.

DONE at Houston, Texas, this 7th day of January, 1983.

/s/ ROSS N. STERLING
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1762

DENNIS J. LEWIS,
Plaintiff,

v.

BROWN & ROOT, INC.,
Defendant.

AFFIDAVIT

My name is Clinton B. Gettig and I swear to the truth of the following facts:

On April 21, 1982, the above captioned case was heard before the Honorable Ross N. Sterling, and I was the Court Reporter. I kept accurate notes of the proceedings, but in keeping with my normal practice I did not record the precise time of recess and resumption of trial. Later, in attempting to assign the exact times when the rather unusual events of that day occurred, I made a mistake. Upon searching my memory, and reviewing the affidavit of Dennis J. Lewis, dated May 18, 1982, and the arguments of defense counsel submitted to the Court on October 28, 1982, I believe the Court announced a fifteen minute recess (not a noon recess) at approximately 12:20 p.m., reconvened at approximately 12:35 p.m., waited for the Plaintiff and his counsel for approximately fifteen additional minutes, and then dismissed the case at approximately 12:50 p.m.

SWORN TO AND SUBSCRIBED this 5th day of January, 1983.

/s/ CLINTON B. GETTIG
Clinton B. Gettig

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared CLINTON B. GETTIG, who, after being duly sworn, stated that he is the person named in the foregoing instrument, and that every statement or thing contained therein is true to the best of his knowledge and belief.

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, this 5th day of January, 1983.

/s/ NANCY RICKER
Notary Public in and for
Harris County, Texas.
My Commission Expires
February 8, 1984